

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRACY JENSON,

Plaintiff,

v.

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION,
AFL-CIO, and ADELL
HUMPHREYS, and PAUL RINALDI,
Defendants.

NO: CV-10-069-RMP

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS AND
DENYING PLAINTIFF'S MOTION
TO REMAND

Before the Court is Defendant's Motion to Dismiss (Ct. Rec. 9). Defendants are National Air Traffic Controllers Association, AFL-CIO ("NATCA"), a union, its Chief of Staff, and its President. Plaintiff, Mr. Tracy Jenson, is a former union member proceeding *pro se*.

BACKGROUND

Mr. Jenson was employed as an air traffic controller by the Federal Aviation Administration ("FAA") until April 2003, when he voluntarily resigned his position (Ct. Rec. 11 at 3; Ct. Rec. 3 at 2). While employed as an air traffic

1 controller, Mr. Jenson was a member of NATCA. In the early 1990's, the FAA
2 decided to privatize certain air traffic control towers. In 1994, NATCA and
3 individual air traffic controllers filed a lawsuit challenging the FAA's decision to
4 privatize certain air traffic control towers (Ct. Rec. 10-4 at 29). A federal district
5 court vacated the privatization program (Ct. Rec. 4 at 29). Apparently, NATCA's
6 lawsuit delayed Mr. Jenson's scheduled move to a new air traffic control facility
7 (Ct. Rec. 3 at 1; Ct. Rec. 13 at 2). Mr. Jenson alleges that (1) when he finally did
8 move to a new facility, he improperly received a smaller pay raise than what he
9 was entitled to and that (2) NATCA failed to represent him by not fixing this
10 mistake (Ct. Rec. 1 at 7). Mr. Jenson acknowledges that he received a 54.5% pay
11 raise over a four year period while alleging that other employees received at least a
12 100% pay raise over the same time period (Ct. Rec. 3 at 8).

13
14
15
16
17
18 On or about January 21, 2010, Mr. Jenson filed a complaint in small claims
19 court in Spokane County against NATCA for "Financial assault—Refusal to
20 Represent—Fraudulent Acceptance of Union Dues—Breach of Contract" (Ct. Rec.
21 1 at 7). Named Defendants are NATCA and Adell Humphreys, NATCA's chief of
22 staff. Subsequently, Paul Rinaldi, NATCA's president, became an additional
23 named defendant (Ct. Rec. 1 at 2).

24
25
26 On or about February 18, 2010, NATCA received a copy of Mr. Jenson's
27 pleading (Ct. Rec. 1 at 2). On March 17, 2010, Defendants filed a notice of
28

1 removal on the grounds that Mr. Jenson's claim alleges a breach of a collective
2 bargaining agreement and/or the duty of fair representation, which alleges an
3 unfair labor practice, the adjudication of which lies within the exclusive
4 jurisdiction of the Federal Labor Relations Authority ("FLRA") (Ct. Rec. 1). In
5 their Motion to Dismiss, Defendants contend that this Court lacks subject matter
6 jurisdiction over Plaintiff's claims because Plaintiff's claims are subject to the
7 exclusive jurisdiction of the Federal Labor Relations Authority (Ct. Rec. 9 at 1-2).

8
9
10
11 On March 19, 2010, Mr. Jenson filed a "Request to Deny Petition for
12 Removal From Small Claims" (Ct. Rec. 3). Defendants construed this objection as
13 a Motion to Remand and responded accordingly (Ct. Rec. 6).

14
15 Mr. Jenson has routinely sought legal redress for these alleged wrongs,
16 including in a number of cases. In September of 2004, Mr. Jenson attempted to
17 intervene in litigation between NATCA and the FAA by filing a motion for order
18 of contempt (Ct. Rec. 10-4 at 29). Similar to his present complaint, Mr. Jenson
19 claimed then that the agreement between NATCA and the FAA caused him to
20 receive a smaller pay increase than other employees (Ct. Rec. 10-4 at 32). The
21 court dismissed the claim, finding that it did not have subject matter jurisdiction
22 (Ct. Rec. 10-4 at 32).

23
24
25
26 On January 29, 2007, Mr. Jenson filed an action against NATCA and the
27 FAA in small claims court in the District of Columbia (Ct. Rec. 10-5 at 34). He
28

1 alleged a nearly identical claim of “financial assault” and sought the return of
2 \$5,000 of union dues (Ct. Rec. 10-5 at 34). The case was removed to federal court
3 and dismissed for Mr. Jenson’s failure to respond to a Motion to Dismiss (Ct. Rec.
4 10-6 at 36).

5
6 In November of 2009, Mr. Jenson, proceeding *in forma pauperis*, filed a
7 complaint in the Eastern District of Washington, again alleging that NATCA
8 improperly delayed his move to another facility and that he received a smaller pay
9 increase than other employees in violation of the Equal Pay Act (Ct. 10-9 at 49).¹
10
11 The court dismissed the complaint for failing to comply with the requirements of
12 Fed. R. Civ. P. 8(a) (Ct. Rec. 10-9 at 49). The court expressed that it had not been
13 satisfied that “jurisdiction and venue” were properly stated by Mr. Jenson (Ct. Rec.
14 10-9 at 50).

15
16 Mr. Jenson also has sought relief via the FLRA (Ct. Rec. 13 at 13; Ct. Rec.
17 10-7 at 37).

20 **APPLICABLE LAW**

21
22 Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, dismissal
23 is appropriate when the court lacks subject matter jurisdiction over a claim.
24

25
26 ¹ Mr. Jenson states that this case, unlike his 2009 case, does not claim a violation of
27 the Equal Pay Act (Ct. Rec. 13 at 11).
28

1 Fed.R.Civ.P. 12(b)(1). When considering a motion to dismiss pursuant to Rule
2 12(b)(1), the district court may review any evidence, such as affidavits and
3 testimony, to resolve factual disputes concerning the existence of jurisdiction.
4
5 *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988), cert. denied, 489
6 U.S. 1052 (1989); *See, e.g., Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947) ("when
7 a question of the District Court's jurisdiction is raised . . . the court may inquire by
8 affidavits or otherwise, into the facts as they exist").
9

10
11 “Federal courts are not courts of general jurisdiction; they have only that
12 power that is authorized by Article III of the Constitution and the statutes enacted
13 by Congress pursuant thereto.” *Bender v. Williamsport Area School Dist.*, 475
14 U.S. 534, 541 (1986). “It is to be presumed that a cause lies outside this limited
15 jurisdiction, and the burden of establishing the contrary rests upon the party
16 asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
17 377 (1994).
18
19

20 The Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101 *et seq.* (“CSRA”),
21 is “an integrated scheme of administrative and judicial review, designed to balance
22 the legitimate interests of the various categories of federal employees with the
23 needs of sound and efficient administration.” *United States v. Fausto*, 484 U.S.
24 439, 445 (1988). In explaining the preclusive effect of the CSRA, the Supreme
25
26
27
28

1 Court stated that it was enacted to replace “the haphazard arrangements for
2 administrative and judicial review of personnel action.” *Id.* at 444.

3 NATCA is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4)
4 of the CSRA. The CSRA defines “grievance” as any complaint concerning “the
5 effect or interpretation, or a claim of breach, of a collective bargaining agreement.”
6

7
8 5 U.S.C. § 7103(a)(9)(C)(i). 5 U.S.C. § 7121(a)(1) states,

9 Except as provided in paragraph (2) of this subsection, any collective
10 bargaining agreement shall provide procedures for the settlement of
11 grievances, including questions of arbitrability. Except as provided in
12 subsections (d), (e), and (g) of this section, the procedures shall be the
13 exclusive administrative procedures for resolving grievances which
14 fall within its coverage.

15 *Id.* 5 U.S.C. § 7121(a)(2) allows a collective bargaining agreement to exclude any
16 matter from the application of the grievance procedure which is provided for in the
17 agreement. Subsections (d), (e), and (g) pertain to the election of remedies when
18 the grievance involves “prohibited personnel practices” as set forth under 5 U.S.C.
19 § 2302(b), 5 U.S.C. § 4303, and 5 U.S.C. § 7512. “[A]ny grievance not
20 satisfactorily settled under the negotiated grievance procedure shall be subject to
21 binding arbitration which may be invoked by either the exclusive representative or
22 the agency.” § 7121(b)(1)(C)(iii).

23 NATCA and the FAA were parties to a collective bargaining agreement,
24 effective September 1998, which included a mandatory grievance procedure for the
25
26
27
28

1 handling of complaints by “any employee concerning any matter relating to the
2 employment of the employee” (Ct. Rec. 10-10 at 53). Therefore, the CSRA
3 applies in this case and precludes any other court from addressing issues that fall
4 within CSRA. *See* 5 U.S.C. §§ 7101 *et seq.*

6 APPLICATION

7 1. Allegation of Improperly Receiving a Smaller Pay Raise

9 Defendants contend that Mr. Jenson’s allegation that he improperly received
10 a smaller pay raise constitutes a claim for breach of the collective bargaining
11 agreement (Ct. Rec. 11 at 8). This in turn constitutes a grievance under 5 U.S.C. §
12 7103(a)(9)(C)(i). Accordingly, Defendants argue that under 5 U.S.C. § 7121(a),
13 Plaintiff’s exclusive available procedure was the one outlined in the collective
14 bargaining agreement and finally the FLRA (Ct. Rec. 10-10 at 53). Therefore,
15 Defendants contend that this Court lacks subject matter jurisdiction over Mr.
16 Jenson’s action under 5 U.S.C. § 7121(a).

17 The Court finds that NATCA is a labor organization within the meaning of
18 5 U.S.C. § 7103(a)(4). Mr. Jenson’s complaint of an improper pay raise is a
19 grievance under U.S.C. § 7103(a)(9)(C)(i). 5 U.S.C. § 7121(a)(1) does generally
20 provide the exclusive procedures for resolving grievances which fall within its
21 coverage and NATCA and the FAA were parties to a collective bargaining
22 agreement which included a mandatory grievance procedure (Ct. Rec. 10-10 at 53).

1 However, there are exceptions to the exclusive administrative procedures for
2 resolving grievances in subsections (d), (e) and (g) of 5 U.S.C. § 7121(a).

3 Subsections (d) and (g) are relevant to prohibited personnel practices. Mr. Jenson
4 states that NATCA did cause a prohibited personnel practice under 5 U.S.C. §
5 2302(b)(9)(a) (Ct. Rec. 13 at 4). § 2302(b)(9)(a) states,
6

7
8 [a]ny employee who has authority to take, direct others to take,
9 recommend, or approve any personnel action, shall not, with respect
10 to such authority . . . take or fail to take, or threaten to take or fail to
11 take, any personnel action against any employee or applicant for
12 employment because of . . . the exercise of any appeal, complaint, or
grievance right granted by any law, rule, or regulation.

13 *Id.* Specifically, Mr. Jenson states that NATCA “fail[ed] to take the
14 personnel action (pay raise) because of a complaint against the employer”
15 (Ct. Rec. 13 at 4). However, Mr. Jenson has consistently stated that it was
16 the delay in the move to a new facility that caused his smaller pay increase
17 rather than its resulting from an “appeal, complaint, or grievance” filed by
18 Mr. Jenson (Ct. Rec. 3 at 2; Ct. Rec. 13 at 2-3). Accordingly, 5 U.S.C. §
19 2302(b)(9)(a) is not applicable and none of the other exceptions of
20 subsections (d), (e) and (g) of 5 U.S.C. § 7121(a) applies.
21
22

23
24 Even though Defendants were able to remove to federal court on the
25 basis of federal question jurisdiction, 28 U.S.C. §1331, because Congress
26 legislated that CSRA control issues of this type, Plaintiff has no legal claim
27
28

1 under CSRA. In addition, Plaintiff has not alleged any other law or legal
2 basis for this Court to assert federal court jurisdiction and address Plaintiff's
3 issues in this matter. Therefore, the Court is without subject matter
4 jurisdiction to consider this claim.
5

6 **2. Allegation of Failure to Represent**

7
8 Defendants argue that Mr. Jenson's second claim, that the Union failed to
9 represent him by not fixing the alleged pay scale error, constitutes an unfair labor
10 practice, of which this Court does not have subject matter jurisdiction (Ct. Rec. 11
11 at 8). *See Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527,
12 529 (1989) *Karahalios* holds that no private right of action exists under the CSRA
13 for breach of a federal employee's right to fair representation by a union.
14
15 Therefore, this Court also lacks subject matter jurisdiction to hear Mr. Jenson's
16 second claim of an unfair labor practice.
17
18

19 **3. Motion to Remand**

20
21 Mr. Jenson claims this Court is without jurisdiction because there is no
22 federal question as he seeks "return of union dues only" (Ct. Rec. 3 at 1). The
23 Court construes Mr. Jenson's objection as a motion to remand to the state small
24 claims court. However, Mr. Jenson's rationale for his entitlement to these dues
25 goes back to his underlying allegations: (1) that when he moved to a new facility,
26 he improperly received a smaller pay raise than what he was entitled to, and that
27
28

1 (2) NATCA failed to represent him by not fixing this mistake (Ct. Rec. 1 at 7). As
2 discussed *supra*, these claims raise federal questions even though Congress has
3 limited the subject matter jurisdiction of federal courts to hear such claims. To
4 remand to the state small claims court “would interfere with the congressional
5 objective of making the CSRA an ‘exclusive’ forum” for such challenges.” *Saul v.*
6 *United States*, 928 F.2d 829, 841 (9th Cir. 1991). Accordingly, Mr. Jenson’s
7 Motion to Remand is denied.
8

9
10 Accordingly,

11
12 **IT IS HEREBY ORDERED:**

- 13 1. Defendant’s Motion to Dismiss (Ct. Rec. 9), is **GRANTED**.
14
15 2. Plaintiff’s Motion to Remand (Ct. Rec 3) is **DENIED**.

16 The District Court Executive is directed to enter this Order, provide copies
17 to Plaintiff and counsel, enter judgment consistent with this order, and **CLOSE**
18 **THE FILE**.
19

20 **DATED** this 7th day of September, 2010.
21

22
23 s/ Rosanna Malouf Peterson
24 ROSANNA MALOUF PETERSON
25 United States District Court Judge
26
27
28